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IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1989

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DAVID A. NORDSTROM, et al

Petitioners

vs.

THE STATE OF WASHINGTON, et al

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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GARY H. BENJAMIN
Attorney at Law

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(a)

## QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Ninth Circuit commit error by ruling that the Petitioners' complaint raised federal issues that were only defenses to a state court judgment, and therefore the federal courts lacked subject matter jurisdiction?

(b)

## PARTIES TO THE PROCEEDINGS

Plaintiffs named in this case were: David A. Nordstrom, Theodore H. Dahm, Robert L. Brown, Richard Wiedenhoft, James P. Kittleson, Joseph J. Ray, Harry Brookman, Malcom D. Rixon, Gaspar V. Policani (upon his demise, substituted with William A. Smith), and George Hibbs.

Defendants named in this case were: The State of Washington and the Honorable Vernon R. Pearson in his capacity as Chief Justice of the Supreme Court of Washington; U. S. Department of Defense, the Honorable Frank C. Carlucci, Secretary; U.S. Department of the Air Force, the Honorable Richard C. Aldridge Jr., Secretary; U.S. Department of the Army, the Honorable John O. Marsh Jr., Secretary, and the U. S. Department of the Navy, the Honorable William L. Bell, Secretary.

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(d)

## OPINIONS DELIVERED IN THE COURTS BELOW

Notice of Hearing and Order of Dismissal with Prejudice, filed October 20, 1988 (Appendix A); Transcript of Proceedings of October 5, 1988 (Appendix B); Memorandum decision of the United States Court of Appeals for the Ninth Circuit, filed February 16, 1990 (Appendix C).

None of the decisions of the courts below are officially published.

(e)

## GROUNDS UPON WHICH JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals was entered on February 16, 1990. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

This Petition is docketed within ninety days of the entry of the order in the Ninth Circuit Court of Appeals.

(f)

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves a challenge to the Constitutionality of the Uniformed Services Former Spouse Protection Act, Pub. L. 97-252, codified as 10 U.S.C. 1408, which is set forth in full in Appendix E. Alternatively, this case involves the interpretation of that Act, and in particular, sub-sections (c)(1) and (c)(2), which are set out below. Sub-section (c)(1) provides:

> Subject to the limitations of this section, a court <u>may</u> treat disposable retired or retainer <u>pay</u> <u>payable</u> to a member... either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. (Emphasis added).

Sub-section (c)(2) provides:

> Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transfered, or otherwise disposed of (including by inheretance) by a spouse or former spouse.

Several other federal statutes are involved to the extent that they peripherally support Petitioners' contentions. These are set forth in full in the Appendix. These statutes are 10 U.S.C. 101(27), 29 U.S.C. 1002(32), and 29 U.S.C. 1003 (Appendix F). State statutes in apparent conflict are set out in Appendix G. Constitutional provisions are set forth in Appendix H.

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## STATEMENT OF THE CASE

Petitioners, retired members of the uniformed military services, brought an action in the United States District Court for the Eastern District of Washington alleging that the courts of the State of Washington under color of a federal statute but in contravention of federal statutory and case law, and in violation of Washington State statutory law, had discriminatorily and unlawfully diverted their current and future income. Petitioners alleged that the very law utilized by the courts of the State of Washington, specifically 10 U.S.C. 1408, is an unconstitutional act, prohibited by the United States Constitution, Article 1, Section 8, clauses 12, 13 and 14. Knickerbocker

Ice Co. v. Stewrat, 253 U.S. 149 (1920). Petitioners also alleged due process and equal protection arguments. Petitioners sought no monetary damages.

Petitioners also sought, by way of a declaratory judgment, a judicial declaration defining the legal character of military retired/retainer pay and injunctive relief. Jurisdiction was asserted pursuant to the Constitution of the United States, Article III, Sec. 2, Clause 1; and 28 U.S.C. 1331; 28 U.S.C. 1355; 28 U.S.C. 1343 (3)(4); 28 U.S.C. 1356, and 5 U.S.C. 702.

Petitioners brought before the District Court a motion to certify their complaint as a class action pursuant to Fed.R.Civ.P. 23(b)(2), and for temporary injunctive relief. Respondents, state and federal defendants below, responded by filing motions to dismiss the action.

A hearing was held on the motions to dismiss on October 5, 1988. The District Court Judge used a prior unpublished opinion in which he had ruled that the Uniform Services Spouse's Protection Act, 10 U.S.C., Section 1408, overruled McCarty v. McCarty, 453 U.S. 210 (1981), thus allowing the courts of the State of Washington to treat military retired retainer pay as deferred compensation. Therefore, he reasoned that the Petitioners failed to state a claim. He then decided that the court lacked subject matter jurisdiction. The complaint was dismissed pursuant to Fed.R.Civ.P. 12(b)(6), and Fed.R.Civ.P. 12(b)(1).

A timely appeal was taken to the United States Court of Appeals for the Ninth Circuit. The Court, in a

Memorandum Opinion filed February 16, 1990 upholding the District Court's reasoning, said that the complaint was properly dismissed for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1). It affirmed the dismissal and did not reach the Fed.R.Civ.P. 12(b)(6) issue. A timely Petition for Writ of Certiorari was filed in this Court.

(h)

ARGUMENT

This case arises from the Petitioners' complaint as to the nature of the legal definition of retired/retainer pay as received by members of the United States Armed Forces placed on the roll of the retired reserves. This action is predicated on the denial of the

Petitioners' due process rights in the definition of their retired/retainer pay by the state courts, and the corresponding treatment afforded the class of persons known as "military retirees", as opposed to all other classes of persons in the State of Washington. The complaint alleges, inter alia, that the courts of the State of Washington ignore Title 10 and Title 26 of the U.S.C., their own statutes, Wash.Rev.Code Ann. 26.16.140, (Appendix C), and Wash.Rev.Code 6.16.030, now recodified as Wash.Rev.Code Ann. 6.15.020, (Appendix C), and established and extensively cited federal case law, by defining military retired/retainer pay as a "pension", as "deferred" compensation. See for example Marriage of Parks, 48 Wash.App. 166, 737 P.2d 1316 (1987).

This erroneous classification then "permits" the courts of the State of Washington, albeit in violation of R.C.W. 6.16.030 (Appendix C) and 29 U.S.C. 1003, and 29 U.S.C. 1002 (32)(Appendix B), to divide this purported "property" in dissolution of marriage actions. The complaint seeks only declaratory and injunctive relief.

Specifically the complaint seeks (1) declaratory relief as to the legal character of military retired/retainer pay, either as "wages" (current compensation), or a "pension" (deferred compensation); (2) declaratory relief that the courts of the State of Washington are unconstitutionally applying the state laws to the Petitioners and the class of persons they seek to represent; and (3) an injunction precluding the federal

agencies from honoring such decrees.

The complaint does not allege that the Washington decrees are invalid. The complaint does not allege that the State of Washington does not have the jurisdiction, right or province to regulate dissolutions of marriage for all citizens of that state. The complaint does allege that the State of Washington is discriminating against military retirees by this classification, and thereby placing them in involuntary servitude for the rest of their lifetime, in repugnance to the Thirteenth Amendment of the Constitution of the United States.

Petitioners argued at the trial court that the Uniformed Services Former Spouse Protection Act, 10 U.S.C. 1408 (hereinafter FSPA or the Act), was an unconstitutional delegation of

exclusive Congressional authority. (TP) (Appendix F).

## (A) TITLE 10 U.S.C. 1408 INASMUCH AS IT DELEGATES TO THE VARIOUS STATES MATTERS EFFECTING THE COMPENSATION OF FEDEPAL MILITARY MEMBERS, IS UNCONSTITUTIONAL, IN VIOLATION OF THE UNITED STATES CONSTITUTION, ARTICLE 1, SECTION 8.

The Former Spouses' Protection Act is unconstitutional as a delegation of exclusive Congressional authority. Clearly, the raising and maintaining of the military is exclusively a function reserved by the United States Constitution to Congress. By virtue of the Constitutional reservation of authority to Congress, likewise, Congress may not delegate its responsibility. A similar question was decided in Knickerbocker Ice Company v. Stewart, 253 U.S. 149 (1920). Congress is exclusively authorized by the

Constitution to fix and address remedies for seaman injured at sea. Congress enacted legislation which provided an election of remedies for the seaman under the various laws of the various states. The Court held that the delegation of power to the states which would control or affect the Congressional schema was an unconstitutional delegation of authority by Congress.

The perpetuation of the mischaracterization of retired pay as "pension" or "deferred compensation" as is done by the courts of the State of Washington, is radically inconsistent with federal law respecting the pay. Congress alone has the power and authority to regulate pay for military service and to determine what constitutes military service for which

compensation is required or payable. United States Constitution, Article I, section 8, Clauses 12, 13, 14, and 16; United States v. Standard Oil, 332 U.S. 301 (1947) [holding personnel affairs/ pay subject exclusively to U.S. regulations]; Free v. Bland 369 U.S. 663 (1962) [holding that federal law and congressional enactments control the determination of the character of retired pay as present earnings]; McCarty v. McCarty, 453 U.S. 210 at 232 (1981).

State courts may not redefine military retired pay. Wissner v. Wissner, 338 U.S. 655 (1950). Appellant's are under contract for services and are, therefore, employees of the United States Armed Forces, continuing to serve the United States Armed Forces as officers and

non-commissioned officers on retired reserve status. Their right to receive pay or retired pay is established by federal statute. Bell v. United States, 366 U.S. 393 (1961) [holding that a soldier's entitlement to pay is dependent upon a federal statutory right]; Goodley v. United States, 441 F.2d 1175 (Ct.Cl. 1971); Costello v. United States, 442 U.S. 929 (1979) [stating "the contract seems to mean that Stevens will receive the pay authorized by statute from time to time as he performs his service"], and is a yearly appropriation by Congress in consideration for his continuing service and observance of restrictions [United States v. Larionoff, 431 U.S. 864 (1977)]. [Forfeiture of pay upon employment subject to "supervision and control" of foreign gov't; Hostinsky v.

United States, 292 F.2d 508 (Ct.Cl. 1961): [prohibition against dual officer status/pay; Hooper v. Hartman, 163 F.Supp. 437, aff'd (9th Cir., 1958) 274 F.2d 469 (Rear Admiral tried by court martial, when found guilty, forfeited right to earn retired pay)].

Other restrictions include: (a) reductions in pay if certain employment accepted (10 U.S.C. 5532); (b) forfeiture of pay for certain crimes (10 U.S.C. 8312); (c) forfeiture if employed by foreign government (U.S. Const. Art. I, sec. 9 Cl. 8); (d) forfeiture of pay for employment with defense work for private firms within three years of retirement (37 U.S.C. 801)(1); (e) recall involuntarily (10 U.S.C. 3504(a); (f) forfeiture if foreign citizenship is acquired (37 Comp.Gen. 207; 41 Comp.Gen. 715); (g) subject to UCMJ.

Congress has determined that while the military member is on an indefinite service contract with this nation, he will continue in the capacity of his "retiring" rank unless he violates the terms and conditions of his employment contract with the United States Armed Forces. Congress has expressly retained the inactive duty member and makes monthly (periodic) payments to him in consideration for his continuing (but reduced) service to the United States Armed Forces. United States v. Morton, 112 U.S. 1 (1884); United States v. Mills, 197 U.S. 223 (1904); Kahn v. Anderson, 255 U.S. 1 (1920); Leonard v. United States, 279 U.S. 40 (1928); Puglisi v. United States, 215 Ct.Cl. 86, 564 F.2d 403, cert. den. 435 U.S. 968 (1978); Lockhart v. Mittlemann, 123 F.2d 703 (2nd Cir. 1941); Andrews v. United

States, 175 Ct.Cl. 561 (1966); Chambers v. Russel, 192 F.Supp. 425 (N.D. Cal. 1961); Hooper v. Hartman, supra; United States v. Tyler, 105 U.S. 244 (1882); Costello v. United States, supra; Watson v. Watson, 424 F.Supp. 866 (E.D. N.Car. 1976); Hostinsky v. United States, supra. For over one hundred years, the federal courts have recognized and held that in the absence of a retainer paid to the military member on inactive duty status, the United States would be without right to subject the member to (1) continuing obligations and restrictions, or (2) recall to active duty, United States v. Tyler, supra.

Thus, the sustaining of retainer pay as a "personal entitlement" and the "current earnings" characterization is crucial to federal goals and objectives, United States v. Tyler, supra; Costello

v. United States, supra; 10 U.S.C. section 2771; McCarty v. McCarty, supra. Consequently, state courts are preempted from recharacterizing the pay as deferred compensation, Florida Lime & Avocado Growers, Inc., v. Paul, 373 U.S. 132 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

Military retired pay is paid to the military member as a "personal entitlement" for personal services rendered to the United States Armed Forces. Wissner v. Wissner, supra; 10 U.S.C. 2771; Lemly v. United States, 75 F.Supp. 248, 109 Ct.Cl. 760 (1948); McCarty v. McCarty, supra.

There is no property right in military retired/retainer pay not yet earned. 10 U.S.C. 1408 is an unconstitutuional delegation of authority by Congress to the states.

Even so, it states:

> Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. 10 U.S.C. 1408 (c)(2).

Indeed, the enabling provision of that statute is extremely limited in scope. It states:

> Subject to the limitations of this section, a court may treat <u>disposable</u> retired or retainer <u>pay payable</u> to a member . . . either as the property of the member or as property of the member and his <u>spouse in accordance with the law of the jurisdiction of such court</u>. 10 U.S.C 1408 (c) (1) (Emphasis Added).

That section only purports to allow the state courts to consider <u>disposable</u> income, not the gross income. It further defines it as <u>pay</u>, and only allows the state courts to consider that pay <u>payable</u>. It further only allows the

state courts to consider that pay payable as property of the member or his spouse. It further only allows the state courts to so consider such disposable pay payable to a member and/or his spouse in accordance with the laws of the state. Disposable is defined as the gross income, less taxes required to be withheld, less FICA, less union dues, if any, by Washington law, and is further defined within 10 U.S.C. Pay is defined as wages, remuneration for services. Payable is defined as that which is due and owing, which can be demanded. Spouse is defined as one's marital partner, not one's former marital partner. The laws the State of Washington prohibit the division of one's future wages. R.C.W. 26.16.140. Even though the courts may consider and divide all "property", whether community

or separate, and "while under certain circumstances [a court may] award part or all of one spouse's separate property to the other, the situations which warrant such action are exceptional". Moore v. Moore, 9 Wash. App. 951, 515 P.2d 1309 (1973). Unearned future income is not, however, property. 10 U.S.C. 1408 by its own terms, purports to permit the courts to consider that pay payable at the time of dissolution, and nothing more. 10 U.S.C. 1408 was enacted to overcome the federal preemption, albeit, unconstitutional, and nothing more, and by its own terms made no redefinition, nor created any rights that did not already exist.

State courts will be preempted upon a showing of (1) an expression of Congressional purpose or intent to preempt the field, (2) pervasiveness of

the schema, (3) nature of the field as federal in character, and (4) the inherent need for nationwide uniformity. Congress has preempted the field and has established a pervasive schema by exercising its authority pursuant to the United States Constitution, Article I, section 8, cls. 12, 13, 14, and 16; Article VI, clause 2. Accordingly, the field is exclusively federal in character, United States v. Tarble, 80 U.S. 397 (1872).

It is imperative to maintaining the stability of the armed forces that the consideration a member receives for his service is uniform and does not vary from state to state.

Given similar circumstances in the case of military pay, Appellant's urge this Court to find that FSPA is likewise unconstitutional. The FSPA specifically

delegates to each state the authority to "treat" the pay "in accordance with the laws of the State". This is precisely the issue laid to rest by the Supreme Court in Knickerbocker, supra. Where the delegation abdicates to the states a power/authority granted exclusively by the Constitution to Congress, the Act is an impermissible delegation of non-delegable power.

This Court addressed only the issue of disability compensation recieved in lieu of military retired/retainer pay in the case of Mansell v. Mansell, 490 U.S. _____, 104 L.Ed.2d 675, 109 S.Ct. 2023. This Court was not asked to address the Constitutionality of the Act itself, and properly did not do so. That time has come, the time to determine the Constitutionality of the Act.

## (B) THE BASIS OF THE COURT'S DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION UNDER FED.R.CIV.P. 12(b)(1) IS ERRONEOUS AND MUST BE REVERSED.

The standard for review of dismissal under Fed.R.Civ.P. 12(b)(1) is the clearly erroneous standard. Calhoun v. United States, 475 F.Supp.1, 3 (S.D.Cal, 1977); Sherman v. Yakaki, 549 F.2d 1287 (9th Cir. 1977); Scheuer v. Rhodes, 416 U.S. 232, 237 (1974). The trial court below, cited no basis for its dismissal, but referred only to a previous decision of his in an unpublished case (TP). In that unpublished case, the trial court below used the authority of Janakes v. United States Postal Service, 768 F.2d 1091 (9th Cir. 1985), and erred in reading the language of the case. The question is not whether the Plaintiffs could use 10 U.S.C. 1408 as a basis for coercive

action, but whether Defendants could do so. At pg. 1093, the Court states in Janakes that:

> [4] If, however, the declaratory judgment defendant could have brought a coercive action... then we have jurisdiction notwithstanding the declaratory judgment plaintiff's assertion of a federal defense... (emphasis added).

Surely, the declaratory judgment defendant, the United States Government, can use 10 U.S.C. 1408, or any other federal law, to enforce its rights. The trial court's previous reliance on the mandate of Hasbrouck v. Texaco, Inc., 663 F.2d 930, 933 (9th Cir. 1981) was faulty. Although the trial court below correctly read Hasbrouck as denying the District Courts within the Ninth Circuit the authority to overrule the decisions of the Ninth Circuit, it erroneously used Fern v. Turman, 736 F.2d 1367 (9th Cir. 1984) as its basis. This case is

clearly distinguishable from Fern. Firstly, the actions in Fern were removal actions taken from in process, active state courts actions. It is clear that the federal courts will not take an action from the state courts without allowing the action to be decided first by the states. The case at bar is not a removal action. The case at bar is not currently pending in any other court. The court in Fern stated at pg. 1369, that:

> [In Fern, s]tate court proceedings are ongoing. Until these proceedings are completed, and it has been determined that appellants must relinquish a portion of their retired pay, a decision by this court on the claims against the federal defendants would be premature... Appellants' claims against the federal defendants are therefore unfit for judicial resolution because they are contingent both upon a decision of the state court not yet final and in administrative action not yet taken.

This case cures all of the reasons given in Fern. There are no pending state court actions. Those actions are final. There are garnishments being taken. Administrative action has been taken. The case is ripe for review. There is current, immediate and devastating impact upon the Plaintiffs.

The Ninth Circuit Court belatedly published its earlier unpublished opinion in that case, Williams v. State of Washington, 894 F.2d 391 (9th Cir. 1987), on January 16, 1990, and used that decision published after argument to the court as the basis for affirmance of the dismissal in this case. Neither the trial court nor the Ninth Circuit Court addressed or acknowledged Petitioner's argument that the federal courts have jurisdiction to reverse any judgment regarding the award of federal

property in a manner that is inconsistent with federal law respecting that property. McCune v. Essig, 199 U.S. 382 (1905).

Federal statutes are to be construed to achieve uniform results throughout the nation Reconstruction Finance Corporation v. Beaver County, 328 U.S. 204, 209 (1946). Congress legislates with full awareness of the cannons of statutory construction. Lorillard v. Pons, 434 U.S. 575, 580 (1978); Cary v. Curtis, 44 U.S. 236, 240 (1845). The case at bar is ripe for review. The issue is an important one.

The state courts have absolutely no proper authority or right to garnish or "divide" Appellant's current pay for the benefit of another not their spouse, as a property right, as to do so would be repugnant to the Thirteenth Amendment of

the Constitution of the United States, by placing Appellant's in a state of involuntary servitude. Appellant's retired/retainer pay as a member of the retired reserve, is unassailable as a property right other than community property, as it only becomes "property" as it is earned. 10 U.S.C. 101(27) defines pay for all of Title 10 U.S.C. That section lists as "pay", inter-alia, basic pay, hazardous pay, retainer pay, retired pay and incentive pay. There are no differentiations. Each is a wage, earned day to day, and only payable after they are earned.

The courts are empowered with authority to issue declaratory relief, to give a definition to allow for uniform results. The uniformity sought is a declaration as to the character of military retired/retainer pay, either as

pay, as Plaintiffs contend, or as a pension, as the State of Washington contends, to permit all states then to apply that same characterization under the law of the jurisdiction. The courts are empowered to make a ruling on the constitutionality of a federal statute.

Petitioners stated a federal question, specifically, the definition of federal payments made to federal officers pursuant to federal statutes. The federal courts have jurisdiction over all civil actions arising under the Constitution, laws or treaties of the United States. 28 U.S.C. 1331. Title 10 of the United States Code states that "pay" includes basic pay, special pay, retainer pay, incentive pay, retired pay and equivalent pay. 10 U.S.C. 101(27). The United States Internal Revenue Code defines "pay" as "wages", and

specifically retired or retainer pay at 26 U.S.C. 61(a)(11). The FSPA, 10 U.S.C. 1408, does not redefine that pay. It states:

> Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. 10 U.S.C. 1408(c)(2).

The question yet remains: is that pay current compensation, as this Court and the lower federal courts have consistently held in the past, United States v. Tyler, supra; Costello v. United States, supra; Berkey v. United States, 176 Ct.Cl. 1, 361 F.2d 983 (1966); Hooper v. Hartman, supra; Watson v. Watson, supra; Goodley v. United States, supra; or is it deferred compensation? In the McCarty decision which precipitated the FSPA, this Court

expressly declined to rule whether a state could characterize retired pay as deferred compensation. Id. at 223. Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law. Caterpillar v. Williams, 482 U.S. 386 (1987). The federal statutes pled by Petitioners and cited above completely pre-empt state interpretation.

Petitioners alleged that the FSPA, permits the state courts to do one and only one thing, specifically:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member... either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. 10 U.S.C. 1408 (c)(1). [Emphasis Added]

State courts thus may apply state law to the "thing" (retired/retainer pay), as defined by federal law, not redefine the "thing" in contravention of federal law. Plaintiffs alleged that 10 U.S.C. 1408 allowed the states no other latitudes.

Neither the Ninth Circuit nor this Court has revised or amplified the holding of the Ninth Circuit in Costello supra, that "retirement pay does not differ from active duty pay in its character as pay for continuing military service". Id at 427. That very definition is as alleged by Petitioners, and is ignored by the courts of the State of Washington.

As this Court so correctly stated, "[the] statutory language is straightforward: 'A member of the Army [or Air Force, or Marines, or Navy, under

corresponding statutes] retired under this chapter is entitled to retired pay...' 10 U.S.C. 3929". McCarty, supra, at 223. This Court went on to say that:

> At the least, then, the possibility that Congress intended military retired pay to be in part current compensation for those risks and restrictions suggests that states must tread with caution in this area, lest they disrupt the federal scheme. Citations omitted. Id. at 223, f.n. 16.

The FSPA (10 U.S.C. 1408(c)(1)) states that the state courts may consider retired/retainer pay payable either as property of the member or member and his/her spouse, in accordance with the laws of that state. It does not say that the state courts shall divide military pensions, regardless of when payable, in spite of the laws of the state.

The pre-emptive force of Title 10 and Title 26 of the United States Code are so powerful as to displace entirely any state action redefining the nature or character of a federally originated, defined and administered subject as the United Stated Armed Forces or the pay, entitlement or other regulation thereof. Congress alone has the power to provide and maintain the armed forces and to make rules and regulations therefore. U.S. Constitution, Article I, sec. 8, cls. 12, 13 and 14. Congress has defined military retired/retainer pay. 10 U.S.C. 101(27). The FSPA did not redefine military retired/retainer pay. The State of Washington has done so.

The standards applicable to a Fed.R.Civ.P. 12(b)(6) action, as stated in Conley v. Gibson, 355 U.S. 41 (1957)

are equally applicable to Fed.R.Civ.P. 12(b)(1) motions Calhoun v. U.S., supra; Sherman v. Yakaki, supra. Petitioners have clearly stated a federal question, suitable only to the interpretation by the federal courts. The court below has jurisdiction, and the dismissal under Fed.R.Civ.P. 12(b)(1) must be reversed.

## CONCLUSION

Since the Petitioners by asserting certain facts that if proved at trial would grant them the relief sought in the Complaint, and because the United States District Court for the Eastern District of Washington did have subject matter jurisdiction over the case, the decision of that Court must be reversed and remanded for trial on the merits.

Petitioners respectfully pray that

a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit, remanding this case for trial on the merits.

Respectfully submitted this 15th day of May, 1990.

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